No. 90-1129

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SUMITOMO TRUST & BANKING CO. (U.S.A.),
Petitioner,

v.

HANNON ARMSTRONG & COMPANY,
formerly known as EDEN HANNON & COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Only a few points in the Brief in Opposition need be addressed.

I.

The brief, if read with any care, strongly supports our first point: that the district court's decision was an act of discretion and is therefore reviewable only under an abuse-of-discretion standard.

Nowhere does respondent even claim, let alone show by citation of authority, that Virginia law *requires* im-

position of a constructive trust for a breach of contract, even if the breach represents—to use some of respondent's colorful rhetoric—"flagrant and deliberate wrongdoing" or "treachery" or a "double cross."[1] Instead, respondent acknowledges that whether to grant an equitable remedy is a matter of *discretion*, to be exercised *on the facts of the particular case*:

> . . . the Supreme Court of Virginia has held in no uncertain terms that, where equitable enforcement is appropriate, a court may " 'adapt[] its relief and mold[] its decrees to satisfy the requirements of the case.' " (Br. Opp. 21) (quoting *Roanoke Engineering Sales Co.* v. *Rosenbaum*, 233 Va. 548, 290 S.E.2d 882, 886 (1982)).
>
> A Virginia equity court "will administer such relief as the exigencies of the case demand," . . . (*Id.* at 22).
>
> " '[T]he court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties.' " (*Id.*)[2]

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[1] All of the evidence cited by respondent was presented to the district court, but that court made no findings that even remotely resemble the gloss which respondent puts on the facts of this case. In any event, under Virgina law a breach is a breach is a breach. None is more culpable than any other. Kamlar Corp. v. Haley, 224 Va. 699, 299 S.E.2d 514, 518 (1983) (punitive damages are not available for breach of contract despite finding by trier of fact that defendant's conduct was "actuated by malicious motives").

[2] This Court's decision in Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) (Br. Opp. 20), is of no help to respondent. The Court in *Franks* made clear that a district court must exercise "sound equitable discretion" in fashioning remedies under Title VII of the Civil Rights Act of 1964. *Id.* at 770. Under the circumstances of that case, the Court ruled that the statute required the grant of seniority relief unless the employer could show that the claimants were not victims of previous hiring discrimination. *Id.* at 772-73. The case has no relevance here.

Nor does this Court's decision in Snepp v. United States, 444 U.S. 507 (1980) (Br. Opp. 23), suggest a different result. That

Respondent does not dispute our contention that, when the district court has exercised its discretion, its decision is to be reviewed on an abuse-of-discretion standard. Nor is there any dispute that the Fourth Circuit did not follow that standard in this case.

Respondent claims that the issues identified in its brief in the Fourth Circuit involved only questions of law subject to a *de novo* standard of review and that petitioner "did not disagree." (Br. Opp. 19) That is a half truth, and a highly misleading one at that. Respondent challenged the district court's ruling that it had not sustained legal injury and also urged that

> "The District Court Erred In Failing To Order Sumitomo To Disgorge the Profits Resulting From Its Breach of Its *Fiduciary* Agreement with Eden Hannon." Brief for Appellant Eden Hannon & Company (i), 27-41 (Mar. 21, 1990) (emphasis added).

In other words, the *sole basis* on which respondent sought the imposition of a constructive trust was on the claim that the noncircumvention agreement imposed a *fiduciary obligation* on petitioner—which is indeed a question of law. *At no time* did respondent suggest that the district court erred because it did not impose a constructive trust on the basis of the court's findings and rulings.[3] Had respondent done so, an entirely different situation would have been presented.

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case was decided under federal law, not Virginia law. It centered on the unique responsibility of the CIA Director to "protec[t] intelligence sources and methods from unauthorized disclosure" under a federal statute, *id.* at 509, and on undisputed evidence that publication of Mr. Snepp's book had seriously impaired "vital national interests." This Court reversed the Fourth Circuit and upheld the district court's imposition of a constructive trust because of Mr. Snepp's breach of his fiduciary duty. *Id.* at 511-12, 515. There is no conceivable connection between *Snepp* and this case.

[3] We made this point in the Petition for Certiorari (pp. 2, 5, 10). The Brief in Opposition seems not to acknowledge that this was

The case therefore is ripe for review on the first of our three questions presented.

II.

There is very little that needs to be said about our point under Fed. R. Civ. P. 52(a).

Both sides agree that the Fourth Circuit did not set aside any of the district court's findings of fact. Both sides agree that the court of appeals expressed doubts about the correctness of certain of the district court's findings.

The issue presented in this case, however, stems from the court of appeals' decision to *act on* those expressed doubts to reach a result different from the district court. The court of appeals imposed a constructive trust on petitioner because of its view about the "wrongful" nature of petitioner's behavior. (App. 9a) That, we contend, is inconsistent with Rule 52(a). Respondent does not address the point.

This question, too, is ripe for review.

III.

Respondent argues that this is not an appropriate case for certification to the state court because petitioner waited until the "thirteenth-hour" to request certification after it had "received an unfavorable judicial decision". (Br. Opp. 27)

The decisions cited by respondent do not support its position. In those cases, the party requesting certification had been given an opportunity to litigate the state law question and, after receiving an adverse ruling, sought to have the question certified to the state court. The courts refused the requests to certify. *Perkins* v.

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indeed respondent's contention. (Br. Opp. 13-14, 18 n.4) To lay this matter to rest, we have lodged a copy of respondent's Fourth Circuit brief with the Clerk.

Clark Equipment Co., 823 F.2d 207, 209-10 (8th Cir. 1987); *Complaint of McLinn*, 744 F.2d 677, 681 (9th Cir. 1984); *Tidler* v. *Eli Lilly and Co.*, 851 F.2d 418, 426 (D.C. Cir. 1988).

This case is entirely different. The Fourth Circuit surprised everyone when it ruled that a constructive trust was an appropriate remedy for a breach of contract in the absence of a fiduciary relationship. That question was simply not before the court, and it would have been frivolous for petitioner to ask for certification of that question during the briefing stage in the court of appeals.[4] This is most emphatically not a case where the petitioner would get a "second chance at victory" after fully litigating the state law question. *See Complaint of McLinn*, 744 F.2d at 681.

Respondent also argues that federal courts have a duty to predict state law, "even in situations where state law is unclear or unsettled." (Br. Opp. 28) Its reliance on *Putman* v. *Erie City Manufacturing Co.*, 338 F.2d 911 (5th Cir. 1964), for this point is sadly misplaced. *Putman* was decided 23 years before the relevant state (Texas) adopted a certification procedure.[5] Judge Wisdom complained that "[o]nce again state guidelines are hard to find and follow," 338 F.2d at 912. Had the certification procedure been in place at the time there might not have been the need for an "Erie educated guess," *id.* at 914.

Nor is this a case like *Tidler*, which declined to order certification when "the applicable state law is clear" and

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[4] Indeed, respondent would doubtlessly have complained, as it does here (Br. Opp. 10), that this was a mere litigation "tactic" designed to increase its burdens.

[5] Duke v. University of Texas, 663 F.2d 522, 525 n.3 (5th Cir. 1981) ("Certification to the Texas Supreme Court is not an option since Texas courts have no authority to hear certified questions from federal courts"); Tex. R. App. P. 114 (adopted effective January 1, 1987).

the relevant sources of law "provide a discernible path for the court to follow." 751 F.2d at 426. The Fourth Circuit in the matter before this Court confessed it was unable to find "a Virginia case that addresses this type of situation." (App. 10a n.2)[6]

Likewise, *West American Insurance Co.* v. *Bank of Isle of Wight*, 673 F. Supp. 760 (E.D. Va. 1987), does not provide respondent the support it claims. (Br. Opp. 28). In that case "there [was] persuasive authority available from other jurisdictions on the unresolved, dispositive state issue." *Id.* at 764-65. Respondent has cited no such authority, and we have also been unable to find any.

If the Fourth Circuit has held, as respondent suggests, that "a constructive trust may be imposed to prevent a party who has breached [*sic*] a noncompetition or noncircumvention agreement from retaining its wrongfully obtained profits" (Br. Opp. 18), this represents an extraordinary new principle of contract remedies. At the very least Virginia courts should be consulted before a change of this magnitude is made.[7] *See, e.g., Tidler*, 851 F.2d at 426 ("federal courts, sitting in diversity,

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[6] The court claimed to have found "guidance" from Virginia cases "substantially similar to the case at bar." (App. 10a n.2) These decisions, however, involved employee agreements not to compete. No constructive trust was imposed in any of those cases, nor did the courts even mention it as a possible remedy. *See* Paramount Termite Control Co., Inc. v. Rector, 238 Va. 171, 380 S.E.2d 922 (1989); Roanoke Eng'g. Sales Co., Inc. v. Rosenbaum, 233 Va. 548, 290 S.E.2d 822 (1982).

[7] Moreover, if the rule is, as respondent phrases it, that a constructive trust "may be imposed" in such a case, then respondent has conceded our Point I. It is the function of the district court, not the court of appeals, to decide whether the remedy should be imposed on the facts of a particular case. *See, e.g.*, International Salt Co. v. United States, 332 U.S. 392, 400-401 (1947) (civil antitrust decree) ("the framing of decrees should take place in the District rather than the Appellate courts. They are invested with large discretion to model their judgment to fit the exigencies of the particular case").

are obligated to apply, not to amend, existing state law"). Certification is, as Judge Butzner has said, "the best solution to the federal courts' difficulty in predicting state law". Butzner & Kelley, *Certification: Assuring the Primacy of State Law in the Fourth Circuit*, 42 W&L L. Rev. 449, 449 (1985). In this case, it is the only solution consistent with the spirit of "cooperative judicial federalism". *Lehman Brothers* v. *Schein*, 416 U.S. 386, 391 (1974).

The certification issue is thus also ripe for review.

CONCLUSION

The Court should issue the writ and reverse the decision below.

Respectfully submitted,

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